IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 11, Original.

THE STATE OF NORTH DAKOTA, COMPLAINANT,

vs.

THE STATE OF MINNESOTA.

REPLY BRIEF ON BEHALF OF THE STATE OF NORTH DAKOTA.

In the supplemental brief filed by Minnesota extended argument has been devoted to questions dealing with the floods of 1915 and 1916, and more particularly to the assumed causes of those floods. This argument differs in essential details from that originally presented, but the objective is the same, viz: (*a*) ascribing those floods to conditions of natural origin, and (*b*) negativing the claim that the artificial ditching in Minnesota materially increased the run-off from the Mustinka watershed.

Conceiving, for reasons already sufficiently explained, these questions were foreclosed by the original hearing, the details received only cursory consideration in the supplemental brief filed on behalf of North Dakota. While nothing stated in the brief now filed in Minnesota's behalf suggests any reason for modifying the conclusion as to the pertinency of the subjects now urged, so many misstatements, both as respects the contentions of North Dakota and the facts themselves, appear as to justify the present reply.

1. It is persistently and repeatedly suggested throughout the argument presented on Minnesota's behalf, in one form or another, that North Dakota denies the years 1915 and 1916 were years of excessive precipitation or what are commonly termed flood years.

North Dakota has presented no such contention, on the contrary, has claimed and shown by incontestible proof that while the years in question were years of more than average precipitation, there was nothing essentially different in those years, either in the volume or distribution of precipitation, from that which had obtained in previous years when no such flooding, either in intensity or duration, occurred in the area in question.

North Dakota has further claimed and emphasized that those conditions, which obtain naturally at intervals or in cycles, as the rotation of wet and dry periods occur, *are not abnormal but natural,* and must be so considered for all the purposes of the questions in the instant case. It has claimed, furthermore, that on the showing in this case, whatever the *natural conditions* disclosed during those years, those conditions were from the standpoint of flood results, intensified and materially increased by the *artificial conditions* disclosed

in the proofs. Finally, it is claimed that whatever conditions obtain naturally in the future, the resultant flood effects must reflect the same increase, for the reasons tersely expressed by Dean Shenehon in the original proof, viz., that there has now been superimposed on the natural conditions, others of artificial character, the axiomatic effects of which are to increase the flood volume.

2. Minnesota now stresses the claim that assuming the artificial conditions have increased the resultant flood levels, there is nothing in the proofs from which the amount of that increase may even be approximately ascertained, hence there is no basis for asserting its responsibility in this cause.

The argument on this feature is not dissimilar to that presented in another form on the original hearing, in which it was asserted in substance that other factors than those for which Minnesota was responsible contributed to the floods here complained of. It will be recalled, in this connection, the question was propounded from the Bench during the oral argument, how any defense could be attributed to the claim that other agencies, than those for which a defendant was responsible, contributed to a resultant tort.

Passing this phase it may be observed that the increase in the floods, due to the ditching, was the main question presented by the evidence and arguments on the original hearing, and that it was there demonstrated to a reasonable mathematical certainty, *the excess volume* of discharge, due to the ditching, was 1,000 second feet for ten days, which accounted for raising the flood levels in Lake Traverse over what would otherwise have obtained approximately 1 foot.

Incidentally, Minnesota now says that assuming the evidence has disclosed an increase in the flood levels, due to the

ditching, there is still nothing to show to what extent the inundation of complainant's area was due to this cause. Here, again, Minnesota manifests a studied purpose of ignoring the patent physical facts. Had the excess volume of discharge, ascribable to the ditching, been retarded within the watershed area where it originated, by far the greater portion thereof would never have reached the ultimate channels at all. Evaporation, seepage and other causes, which in the region in question account for substantially eleven-twelfths of the total annual precipitation (22 inches out of a total of 24 inches, leaving an average of only 2 inches which reaches the ultimate discharge channel), would necessarily have disposed of the major portion of this volume.

The lessening of the volume of discharge under natural conditions, attendant on its distribution over longer periods of time, would necessarily have maintained the ratio of inflow and outflow in Lake Traverse more nearly in correspondence. The flood levels would have been correspondingly reduced. Under such conditions there is no basis or justification, on the facts in the record, for assuming the resultant flood effects would have been essentially different from those manifested in the series of previous years, where the conditions were substantially the same as those obtaining in the years in question.

The flood conditions in those previous years were disclosed by the practically uncontroverted testimony in the case. *No previous flood* had inundated the Bois de Sioux valley *except during the spring run-off*. The duration of those previous floods had been limited from a week to ten days. The use of the lands for purposes of husbandry, for which they were adapted, *had never been prevented.*

The floods complained of, on the other hand, inundated the valley *continuously for practically two years.* The lands were rendered useless for the purposes of husbandry during those years, and the resultant effect of the floods during that period destroyed their utility for the third year.

Notwithstanding Minnesota states in the Supplemental Brief now presented in its behalf, that *there is no showing in the record of the effects of the floods ascribable to the excess water.*

A word more as to the physical facts which the argument, now presented on Minnesota's behalf, ignores. The excess elevation of the Lake, as already stated, was approximately one foot. This excess extended down stream and allowing for the fall of the land, accounted for an increased flood level at Fairmount (12 miles from the Lake's outlet) of from 2 to 3 feet. Owing to the low contours of the valley, particularly on the North Dakota side, this excess level spread back from one to two miles from the river's channel and inundated the area disclosed in the proofs. In the overflowed area the land was substantially level, the inundation varied in depth from zero, at the extreme limit of the overflowed area, to several feet at the river channel. With no outlet and inadequate fall, the resulting phenomena of the duration of the flooded condition was inevitable.

It was shown in the proofs, that in flood conditions generally, it is *the higher levels* that cause the damage. The instant case exemplifies the results in this respect so clearly as to leave no substantial room for argument or controversy. The answer to the contention now advanced on Minnesota's behalf is therefore obvious. The artificial conditions pro-

duced the excess discharge into the boundary channels. This excess discharge was responsible for the higher flood levels disclosed, which last, in turn, were the responsible cause of the floods and resultant damage complained of.

3. Minnesota asserts in the Brief now filed that North Dakota has shifted its position and that the argument now advanced is inconsistent with the contentions previously made in North Dakota's behalf. Thus it is asserted in substance that on the original hearing North Dakota charged the floods complained of, in their entirety, to the artificial conditions created by Minnesota, while in the supplementary proofs, it was tacitly if not expressly admitted that floods must inevitably have existed in the area during the years in question, wholly independent of those artificial conditions.

In the light of the attested facts any such argument, as that thus referred to, is puerile. The testimony of North Dakota was, in substance, that the flood conditions in 1915 and 1916, under natural conditions, would have been of the character and commensurate with those of previous years, in which substantially identical natural conditions obtained. Furthermore, that whatever natural conditions thus obtained, the resultant floods under the artificial conditions were inevitably intensified as a result of those conditions.

Minnesota seems wholly unable to either visualize or comprehend the contention that has been iterated and reiterated on behalf of North Dakota, throughout this case, viz: that the natural conditions constituted the constant factor on which there was now, as a result of the artificial agencies, superimposed the cumulative effect of the latter, in producing floods.

For from shifting its position the evidence and contentions of North Dakota on this phase of the case have remained unmodified from the inception of the issue.

4. Minnesota harks back to its original argument, that the floods were due to natural (meteorological) conditions, and that the latter adequately explain the resulting phenomena. If discussion were in order as to "shifting" positions, a comparison of the original argument and the assumed corroborative data heretofore relied on by Minnesota, with the matters now asserted as controlling, would prove interesting reading. The original record was filled with charts and tabulated data of annual and other extended periods of precipitation. Variant percentages above and below the normal precipitation for such periods were stressed both in the evidence and on argument, as the controlling factors. Notwithstanding it is now stated, in substance, that such records are worthless in determining flood conditions, and that investigation must be limited to the concentrated precipitation of limited periods, associated with compact storms.

As there are many unmistakable evidences of style of composition in the brief now filed in Minnesota's behalf, disclosing that the argument therein is quite largely the handiwork of the same expert whose theories furnished the basis of Minnesota's original expert case, the subject thus referred to is of little material moment except as indicative of belated enlightenment, which might, in sufficient length of time, be expected to ripen into a reasonably comprehensive idea of the controlling factors in the present case.

5. While not wishing to follow the details now urged in Minnesota's behalf, on the issue last referred to, so many

misstatements of fact appear, that brief reference to certain of the more glaring errors seems necessary.

Minnesota now ascribes the flood of 1915 to the natural conditions obtaining in that year, and more particularly to what is claimed to have been the excessive precipitation (7.4 inches) which obtained in the month of June.

It must be borne in mind in considering this contention, that there were no spring floods in 1915, that is, no floods during the usual period of spring breakup, which varies in the region in question, from March 15th to April 15th in each year.

It must also be noted that during the succeeding summer period, when the floods actually occurred, there were no storms of sufficient magnitude to be recorded in the Government Bulletin to which reference is made, and that no storms of material dimensions are disclosed by the records of the Government Weather Bureau.

The precedent conditions of this year are important for their bearing on the later flood manifestations.

The winter of 1914-15, that is from November 1st to May 1st, shows a precipitation for the area in question slightly over 1 inch *less than normal.*

The succeeding months showed as follows:

May	0.9	inches	plus.
June	3.8	"	"
July	0.9	"	minus.
August	1.6	"	"
September	0.5	"	plus.
October	0.5	"	minus.

This, therefore, discloses that the *net results* of the entire summer period, during which the flood occurred, was sub-

stantially 2 inches above the normal, extended over a period of 6 months, and therefore differing from the normal less than ½ inch per month.

During this period there were no storms, as stated, of material character. By reference to the isohyetal map, Fig. 14, page 37, of Government Bulletin 1017, a storm in the northern part of the Red River watershed is disclosed, but the precipitation during this storm in the Mustinka watershed was only approximately 2 inches in 3 days.

Solely for purposes of comparison it may be noted that in June, 1908, the precipitation in the Mustinka watershed was 8.2 inches, and in June, 1914, 10.4 inches, as against 7.4 inches in 1915.

In August, 1900, the precipitation for the Red River watershed as an entirety showed 7.4 inches, but a storm centering over the Mustinka watershed covering the period of August 4th to 11th of that year resulted in a total precipitation of 10.5 inches in 8 days and more than 3 inches in one day.

Following the comparison further, the following relative records of precipitation are illustrative:

June and July, 1915	11.5 inches.
May and June, 1908	12.9 "
May and June, 1905	10.5 "
May and June, 1897	12.2 "

These figures are referred to merely to summarize the facts disclosed in the original record and as confirmatory of what was there stated, that there was nothing in the conditions obtaining in 1915 essentially different from those obtaining in a series of previous years, and notwithstanding a flood

of unprecedented magnitude and duration manifested itself in that year.

The argument now presented by Minnesota follows substantially the same lines in dealing with the conditions of the year 1916.

The errors as respects the facts in this feature are so glaring as to deprive the statements themselves and the argument ostensibly deduced therefrom of any force.

As illustrative, it is now stated the flood of 1916 crested at Wheaton during the first week of July, following the storm which occurred during the last week of June of that year.

As a matter of fact, the undisputed evidence discloses the flood of 1916 occurred in the spring. The crest at Wheaton occurred in March, during the spring breakup.

See Powrie Original Record, p. 2094.

See Chandler Original Record, p. 549.

The Government station was installed at Wheaton the first week of June, 1916. The records of that station reflect no material flood condition, following its installation, during that year. This, of course, excludes the asserted effect of the June storm, on which Minnesota lays stress in its present argument.

The readings of the discharge at Wheaton from the date the station was installed appear in the testimony.

See Chandler Original Record, p. 545.

The excessive storm on which Minnesota relies as accounting for the 1916 flood occurred, therefore, more than 3 months after that flood had crested, and its manifestations had reflected themselves in Lake Traverse and the Bois de Sioux Valley.

Referring to the precedent conditions of the 1916 flood, Minnesota emphasizes the fact that the winter precipitation of 1915-1916 was the largest, as stated, of any recorded year excepting that of 1896-1897, and characterizes the excess as 48 per cent above the normal.

The trivial character of this argument sufficiently appears in the circumstance the normal precipitation during the winter period in the area in question is 3.58 inches, while the actual precipitation of the winter referred to was 5.26 inches, making the excess of 1.68 inches over a period of 5 months.

The wholly unsubstantial character of the argument now advanced is still more markedly emphasized by comparing the winter discharge of the years alluded to with that of a series of previous years, reference being made, as already stated, to the period November 1, to April 1:

1915-1916	5.26	inches.
1891-1892	4.1	"
1892-1893	4.6	"
1893-1894	4.1	"
1895-1896	4.5	"
1896-1897	6.6	"
1906-1907	5.3	"

It thus appears that for the series of years indicated the aggregate precipitation of the winter months varied only approximately an inch.

Furthermore, the figures stated for 1915 and 1916 are for the Mustinka watershed itself. The remaining figures are averages taken from the Government Bulletin covering the whole Red River watershed. The latter averages, owing to

the dry conditions prevailing in the northwest part of this area, are materially lower than that of the Mustinka area itself, notwithstanding the negligible variation is disclosed in the foregoing tabulated data.

There is no showing or claim in the present record that the breakup in the spring of 1916 was attended by any unusual condition. The precedent conditions therefore furnish no explanation for the floods of that year.

Taking up the summer conditions of 1916, the situation will sufficiently appear by the following comparison:

June, July, and August, 1916	13.2	inches.
June, July, and August, 1901	14.5	"
June, July, and August, 1897	14.1	"
June, July, and August, 1905	13.9	"

Here, again, the figures for 1916 are those for the Mustinka watershed, itself, while the remaining figures reflect the results disclosed for the entire Red River watershed.

It is thus apparent that nothing in the Summer conditions disclose any essential differences in the year in question from previous years.

The effect of the recorded storm in the latter part of June, 1916, has already been alluded to, and its discharge as reflected in the readings of the station at Wheaton has already been mentioned.

The only other storm disclosed by the records is that of April 18-21, 1916, in which the precipitation was 2.6 inches, extended over a period of 4 days. This storm occurred nearly a month after the flood crest at Wheaton, and its effect, such as it was, could at most have been cumulative on the results previously obtaining.

6. The brief now filed on Minnesota's behalf criticises the claim of North Dakota that the conditions of 1915-1916 are not assignable to and do not reflect the results of abnormal storms. The statement and claim of North Dakota in this behalf is accurate and verified by the records as disclosed on the original hearing.

7. Minnesota criticises the argument made by North Dakota with respect to the run-off of streams in the Red River area as a whole, and the deductions made by North Dakota on this feature.

It will be recalled that in the supplemental brief filed by North Dakota attention was expressly directed to the area adjoining that of the Mustinka, in the Red River watershed, and the comparison of the stream discharges in that area, with that of the Mustinka under the artificial conditions, was stressed.

In following the general subject of comparative discharge, attention was directed to the showing made in the Government Bulletin of the Thief River, and it was claimed this reflected the results of a particular recorded storm. North Dakota cordially concedes its error in this latter claim, and the justice of Minnesota's criticism thereof.

Further examination, however, discloses the fact which may be ascertained by reference to Map No. 1 of the Government Bulletin, 1017, that the Thief River area *is ditched to a greater extent even* than that of the Mustinka, hence any deductions, for purposes of comparison, or otherwise, from that area are of little relative importance, unless the effect of the artificial ditching is given due weight.

8. Minnesota now claims that according to the showing of the Government Bulletin, the precipitation in 1916 was

greater than for any one of the preceding 38 recorded years. This, it is contended, sufficiently accounts for the duration of the floods of this year.

By reference to the table of precipitation, to which reference is thus made, it will appear that the precipitation in 1916 was closely approximated in the years 1882 and 1896 and by reference to table 4, page 21, the run-off in 1882 and 1897 exceeded that of 1916.

Furthermore, the flood of 1916 *did not follow* the heavy summer precipitation of that year, on the contrary, preceded it. It certainly is not claimed that the flood of 1915 was caused by the precipitation which occurred in the summer and fall of 1916, yet the floods of 1915 were of substantially the same duration.

9. Minnesota says that the floods in other parts of the Red River watershed in the years 1915 and 1916 were due to the meteorological conditions, hence it is fair and reasonable to assume that the same is true with reference to those which occurred in the Mustinka watershed and the valley of the Bois de Sioux river. The argument in this behalf is little more than words. There is no contention floods will exist without precedent precipitation as the responsible cause.

What is contended, is, that whatever floods would have existed under natural conditions, such floods were necessarily intensified and increased in their extent and duration, as a result of the artificial conditions obtaining, and that the increased flood effects, resulting from this increased extent and duration, were those which caused the damage.

At this point it may be advisable to refer to a feature disclosed by the facts, and which has perhaps already been sufficiently commented upon. The artificial ditching in

Minnesota was substantially completed in 1914 (that is, was completed to within about one mile of its ultimate outlet). In the fall of 1914, following the excessive rains of the summer of that year, a limited flood occurred in the Bois de Sioux valley. This was the first flood of this character (fall flood) the existence of which is attested in the testimony of men who have lived in the area for approximately 40 years.

In the spring of 1915, the ditch outlet was completed. There were no floods in the spring of that year. Following the completion of the ditch construction, the summer floods of 1915 and the chain of events already sufficiently alluded to manifested themselves.

10. Minnesota now contends that the increased run-off asserted by North Dakota as a result of the ditching of the Mustinka area is a fallacy, rested upon contentions having no basis in the facts. It is not proposed to retraverse the various details of this feature, but to confine this reply to certain isolated contentions now advanced in Minnesota's Supplemental Brief.

Amongst other things it is therein stated that North Dakota assumes the run-off of the Mustinka watershed in 1916 at .27 second feet per square mile of watershed area, and compares this with the showing of Bulletin 1017, disclosing an average of .12 second feet per square mile for the entire Red River watershed, for the purpose of demonstrating the discharge of the former under the artificial conditions was substantially doubled over what would have obtained under natural conditions. The argument is that the comparison is misleading for the reason in one instance there is taken the result of a particular area during a wet

year, and in the other an average covering the entire Red River area for the period of 38 years. Incidentally, in this connection, it is stated, the Bulletin shows the run-off for the entire Red River area during 1916 was substantially double the average of the preceding year. Hence, the argument is claimed to be devoid of force.

It will be recalled that North Dakota's reference to this factor was only one of a number of hypotheses, all of which led to substantially similar conclusions. Absolute accuracy was not claimed for comparisons of the general nature indicated, on the contrary, they were employed more for purposes of illustration.

In taking *the recorded run-off* of the Mustinka watershed for 1916-1917, North Dakota employed the first year, in which *official records* of that run-off were available, for purposes of comparison. It was impossible to take the entire year of 1916, for the reason the station was not installed until June 6th of that year.

If, therefore, the comparison, based on the Government readings, is to be taken, the recorded discharge of June, 1916, to June, 1917, must be compared with the discharge from the entire area *during the same period*. It will thus appear that the run-off over the entire area during the six months of 1916 and the similar period in 1917 was 2.2 inches, which is substantially .16 second feet per square mile. This, it will be observed, substantially confirms Prof. Chandler's testimony on the original hearing, to the effect the natural run-off would not have exceeded .15 second feet per square mile.

In making these comparisons, however, Minnesota again overlooks the fact that the totals, referable to the entire area,

reflect the benefit and advantage of the accelerated run-off from a comparatively large number of areas in Minnesota, which are artificially ditched, and the similar advantage derived from the fact of other areas in which the natural discharge, on account of the topographical and other conditions, far exceeds that of the Mustinka.

Hence, with allowances for these differences, the results as originally contended for by North Dakota stand as substantially verified.

Minnesota next asserts that taking the five-year period from 1916 to 1922, the total discharge from the Mustinka in inches as shown by the government records was five inches. The similar discharge from the entire Red River area above Fargo, of which it is asserted the North Dakota wild rice constitutes a large part, was 6.5; hence, it is argued that mile for mile the unditched North Dakota area contributed more during the years in question than the ditched Mustinka area, thus disproving North Dakota's contention of increased run-off in the latter.

Minnesota's deductions are both unfair and misleading in this argument. The discharge recorded above Fargo includes the Otter Tail, to which Minnesota makes no reference, which contributes more than half of the total and probably more than the Mustinka and Dakota wild rice combined.

The Otter Tail as shown by Professor Chandler on the original hearing is an area of greater slopes and greater discharge; hence, its exclusion is destructive of the entire argument.

Furthermore, the period referred to embraces a series of drought years in which the total discharge is largely affected

by purely local conditions such as local storms and otherwise and establishes nothing in the way of criteria for flood periods.

Minnesota next directs attention to controverting the claim the Delta Zone was a detaining basin. The fact itself was expressly admitted in the answer and is confirmed by the incontestable physical conditions, including a natural confluence area of several streams with an inadequate outlet. Beyond this, the recitals in the Legislative Act of Minnesota supply all that is required.

It is next argued that the capacity of the natural discharge channels furnishes no criterion for determining the maximum volume of drainage for the reason that vast volumes of water overflowed the channels and swept across the land. The fallacy in these generalizations appears in the circumstance that the movement of the overflow water in comparatively level areas is so far sluggish as to be negligible.

Attention is next directed to the fact that both in 1917 and 1922 there were floods in the Mustinka watershed and none in the Bois de Sioux. Deductions from such facts are largely fanciful. They are dealing with drought years. In 1917 the ditching system unquestionably mobilized the waters in the Mustinka watershed, as it must be expected to do in any year when sufficient precipitation exists, with the result of a slight flood in the area in question. The volume of resulting waters, however, was insufficient to surcharge Lake Traverse. This explains the similar phenomena in 1922.

It is next claimed that North Dakota has produced no records to confirm the increased run-off from the Mustinka watershed due to the ditching. The reason is found in the fact that no such records exist. The station was established

in June 1916, at Wheaton, since which time the area has passed through a cycle of what may be termed drought years. North Dakota, however, has shown by what stands uncontested in the present record, a rate of discharge from the Mustinka area in 1916 double the normal disclosed for any comparable area under natural conditions.

Minnesota lays much stress on the table prepared by Professor Meyer showing that the floods in the years 1916 to 1922 have crested at Fargo within from three to four days after their crest at Wheaton. From this it is claimed the contention of acceleration as a result of the ditches in the Mustinka area is unwarranted.

The data thus referred to reflects nothing more than purely local conditions, necessarily of widely variant character of which there is no evidence. No deductions can be drawn from this state of facts.

Minnesota quotes the bulletin to the effect that the run-off of small areas per unit exceeds that of the larger areas. The statement is inaccurate both as misquoting the bulletin and misstating the fact. The total volume of run-off is substantially the same in both cases. The maximum, for limited periods of time, varies with reference to the area, as stated in the bulletin.

Minnesota next quotes table 5 of the bulletin to show that other streams with comparable areas show substantially the same estimated maximum discharge as the Mustinka. The comparisons are worthless unless we know the topographical and other conditions of such areas which reflect themselves in run-off.

Minnesota next stresses its Exhibit A-4 showing as claimed that the discharge of the Dakota Wild Rice River with some

3,000 miles of area was substantially as great in 1916 as the discharge of the Mustinka.

There were no records for the discharge of the Dakota Wild Rice. Hence, it was gratuitously assumed that discharge could be determined by deducting from the total at Fargo the estimated contributions from all the other contributing watershed areas, the balance being attributed to the Wild Rice. Such deductions are so far theoretical as to deprive them of any force.

But for unduly extending this reply in matter of detail, other data stressed by Minnesota as pertinent, might be subjected to similar criticism. It is believed, however, that sufficient has already been shown to demonstrate Minnesota's main reliance in this case is rested on abstract theorizing, wholly devoid of substantiation on the facts, the application of which negatives conclusions of common every-day observation and experience.

Respectfully submitted,

THE STATE OF NORTH DAKOTA,
By SVEINBJORN JOHNSON,
Attorney General.

M. H. BOUTELLE,
JOHN LIND,
I. C. PINKNEY,
Of Counsel for the State of North Dakota.

Office Supreme Court, U. S.
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APR 24 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

No. 21, 1917, 4

ORIGINAL ACTION. 1110

THE STATE OF NORTH DAKOTA, COMPLAINANT,

vs.

THE STATE OF MINNESOTA DEFENDANT.

NOTICE OF MOTION, MOTION AND STIPULATION FOR APPOINTMENT OF COMMISSIONER TO TAKE AND REPORT TESTIMONY.

WILLIAM LANGER,
Attorney General.
HARRISON A. BRONSON,
Assistant Attorney General for North Dakota.
LYNDON A. SMITH,
Attorney General for Minnesota.
JOHN LIND AND
M. H. BOUTELLE,
Minneapolis, Minn.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 27.

ORIGINAL ACTION.

THE STATE OF NORTH DAKOTA, COMPLAINANT,

vs.

THE STATE OF MINNESOTA, DEFENDANT.

NOTICE OF MOTION.

To the State of Minnesota:

You will please take notice that the complainant herein, the State of North Dakota, by its counsel will move the above court on Monday, April 30, 1917, for the appointment of a commissioner to take testimony, fixing the rate of his compensation and payment of his disbursements, and setting the time and circumstances under which the testimony in this case shall be taken.

WILLIAM LANGER,
Attorney General.
HARRISON A. BRONSON,
Assistant Attorney General.

SUPREME COURT OF THE UNITED STATES.

No. 27, Original Action.

THE STATE OF NORTH DAKOTA, *Complainant*,

vs.

THE STATE OF MINNESOTA, *Defendant*.

Motion.

Now comes the complainant, the State of North Dakota, in the above-entitled cause, by its respective counsel and moves the court that an order issue for the appointment of a commissioner to take and report the testimony in the above-entitled cause, fixing the rate of his compensation and the payment of his disbursements, and setting the time and circumstances under which the testimony in such cause shall be taken, in accordance with and pursuant to the stipulation therefor, hereto attached.

WILLIAM LANGER,
Attorney General.
HARRISON A. BRONSON,
Assistant Attorney General.

Due and personal service of the above notice of motion and motion admitted.

LYNDON A. SMITH,
Attorney General for State of Minnesota.

SUPREME COURT OF THE UNITED STATES.

No. 27, Original Action.

THE STATE OF NORTH DAKOTA, *Complainant*,

vs.

THE STATE OF MINNESOTA, *Defendant*.

Stipulation.

It is herewith stipulated by and between the above-named complainant and the above-named defendant, through their respective counsel, as follows:

First. That Hon. Wallace B. Douglass may be appointed as a commissioner to take and return the testimony to this court in this cause without findings of fact or conclusions of law; that such commissioner shall be allowed, not to exceed ten dollars per diem for his compensation, together with his actual traveling and reasonable hotel expenses, an itemized statement of which shall be submitted to this court in his final report, and that he shall report to this court a stenographic copy of testimony taken before him; that the payment of compensation and his expenses may be made in such manner as the court may direct.

Second. That the complainant may take testimony at such place as it may indicate between the first day of June, 1917, and the first day of August, 1917, upon giving ten days' notice of the time and place of taking testimony to the counsel for the defendant.

Third. That the defendant may take testimony at such place as it may indicate between the first day of August, 1917,

and the first day of October, 1917, upon giving ten days' notice of the time and place of taking such testimony to the counsel for the complainant herein, excepting that the complainant herein may have an opportunity within such time above stated to present in rebuttal expert testimony in engineering and hydraulics immediately after the close of defendant's testimony in that regard.

Fourth. That all direct testimony of expert nature relating to engineering and hydraulics shall be taken on the part of the complainant during the month of July, 1917, and in rebuttal immediately after the close of defendant's evidence in that regard during the month of August, 1917, and in surrebuttal immediately after the rebuttal testimony in that regard of the complainant, except as may be otherwise ordered by this court.

Fifth. That the complainant may take testimony in rebuttal between the first day of October, 1917, and the fifteenth day of October, 1917, and the defendant likewise in surrebuttal between the fifteenth day of October, 1917, and the first day of November, 1917, at such time and place as they respectively may indicate by ten days' notice to opposing counsel.

Sixth. That the above set forth times designated for taking testimony may be varied upon consent of counsel for the respective parties, which shall have the same effect as an order made by this court when entered upon the record before the commissioner.

Seventh. A competent stenographer shall be furnished by each party to the commissioner, who shall be under the direction and supervision of such commissioner. Four copies of

the testimony shall be made, as soon as possible after the taking of each portion thereof, two for the commissioner and one for each of the parties.

WILLIAM LANGER,
Attorney General for North Dakota.
HARRISON A. BRONSON,
Assistant Attorney General for North Dakota.
LYNDON A. SMITH,
Attorney General for Minnesota.

Office Supreme Court, U. S.
FILED
APR 17 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 1 Original.

THE STATE OF NORTH DAKOTA,
Complainant,

vs.

THE STATE OF MINNESOTA.

MOTION AND NOTICE THEREOF TO FIX TIME AND CIRCUMSTANCES FOR TAKING ADDITIONAL TESTIMONY.

CLIFFORD L. HILTON,
Attorney General,
EGBERT S. OAKLEY,
Deputy Attorney General,
MONTREVILLE J. BROWN,
Assistant Attorney General,
Solicitors for the State of Minnesota.
JOHN E. PALMER,
Of Counsel.

Hayward Brief Company, 513 Fourth Ave. So., Minneapolis

Supreme Court of the United States.

No. 12 Original—October Term, 1921.

THE STATE OF NORTH DAKOTA,
Complainant,

vs.

THE STATE OF MINNESOTA.

NOTICE OF MOTION.

To the State of North Dakota:

You will please take notice that the State of Minnesota, by its counsel, will move the court on Monday, April 24, 1922, for an order fixing the time and circumstances under which testimony, heretofore by the order of the court dated April 18, 1921, directed to be taken, shall be taken and certified.

CLIFFORD L. HILTON,
Attorney General,

EGBERT S. OAKLEY,
Deputy Attorney General,

MONTREVILLE J. BROWN,
Assistant Attorney General,
Solicitors for the State of Minnesota.

JOHN E. PALMER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 12 Original—October Term, 1921.

THE STATE OF NORTH DAKOTA,
Complainant,

vs.

THE STATE OF MINNESOTA.

MOTION.

Now comes the State of Minnesota and hereby moves the court as follows:

For an order fixing the time and circumstances for the taking of testimony, heretofore by the order of the court dated April 18, 1921, directed to be taken, in conformity with the stipulation entered into by and between the parties to said cause, dated March 27, 1922, and on file in the office of the clerk of said court, a copy of which is hereto attached.

CLIFFORD L. HILTON,
Attorney General,
EGBERT S. OAKLEY,
Deputy Attorney General,
MONTREVILLE J. BROWN,
Assistant Attorney General,
Solicitors for the State of Minnesota.

JOHN E. PALMER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 12 Original—October Term, 1921.

THE STATE OF NORTH DAKOTA,

Complainant,

vs.

THE STATE OF MINNESOTA.

STIPULATION.

It is hereby stipulated by and between the parties to the above entitled cause, by their respective solicitors as follows:

First: The further evidence directed by the court's order of April 18th, 1921, in this cause, shall be taken before the Hon. W. B. Douglas, the Commissioner heretofore appointed as such by the court in this cause.

Second: The taking of such evidence shall commence on May 8th, 1922, at the Capitol Building in St. Paul, Minnesota, and shall proceed on that and such succeeding dates as the Commissioner shall appoint for that purpose or as the parties may agree with the Commissioner's approval, until such evidence is completed.

Third: The evidence of the complainant shall be first taken, followed by that of the State of Minnesota and the complainant may then offer its rebuttal, if any.

Fourth: On completion of the evidence so taken, the same shall be certified to the court by the Commissioner in accordance with the rules and the orders and directions of the court heretofore made in this cause in that behalf.

Fifth: That briefs shall be filed by each of the parties so that said cause may be assigned for final hearing at the earliest date which the court may fix for such hearing after the opening of the October, 1922, term.

Dated March 27th, 1922.

THE STATE OF NORTH DAKOTA,
By Sveinbjorn Johnson,
Attorney General.

THE STATE OF MINNESOTA,
By Clifford L. Hilton,
Attorney General.

M. H. BOUTELLE,
Of Counsel for the
State of North Dakota.

STATEMENT.

The foregoing motion is made so that the taking of testimony directed to be taken by the order of the court may commence pursuant to the wishes of the parties to the cause. For the convenience of the court we here set forth the order referred to:

"SUPREME COURT OF THE UNITED STATES

No. 14, Original—October Term, 1920.

THE STATE OF NORTH DAKOTA,

Complainant,

vs.

THE STATE OF MINNESOTA.

(April 18, 1921)

ORDER.

To afford an opportunity for the taking of supplemental proof deemed by the court necessary to an adequate consideration and disposition of the cause, it is ordered that the case be restored to the docket to the end that the parties may proceed promptly to take the testimony of not exceeding three engineering experts on each side as to the possibility, within the limits of a reasonable expenditure, of doing away with or ameliorating the flood conditions along the Bois de Sioux River by means other than the injunction prayed for in the bill herein, the testimony thus to be taken to be particularly directed, among other things, to the possibility and effect and estimated cost of any of the following projects: (a) the construction of detaining basins for drainage water throughout the watershed of the Mustinka River for the purpose of withholding a part of the spring waters until the flood period is past; (b) the construction of a

sluice dam at any point in Lake Traverse for the purpose of increasing its capacity as a detaining basin; (c) artificial improvement in the channel of the Bois de Sioux River in order to improve its capacity as an outlet for the waters of Lake Traverse in times of flood, so as to prevent overflow and the inundation of the Bois de Sioux valley, the works to include a sluice dam at the foot of Lake Traverse if necessary in order to maintain its level in times of normal flow; (d) lowering the level of Lake Traverse by means of an outlet to Big Stone Lake, controlled by a sluice dam, with a view to increasing its capacity as a detaining basin during the flood period; (e) by diverting some of the drainage water from the so-called Delta Zone, in order to discharge the same down the Mustinka River, to the Rabbit River.

It is further ordered that the parties may take the testimony of not exceeding three witnesses on each side concerning the proper equitable basis for apportioning the expense of any feasible project among the states drained by the Lake Traverse-Bois de Sioux watershed, taking into account, among other considerations, the amount of water discharged by each state into Lake Traverse or the Bois de Sioux River and the benefit conferred by the improvement.

It is further ordered that testimony shall be taken sufficient to advise the court as to the flood conditions which have prevailed, since the filing of the bill herein, in the area claimed to have been flooded by the action of the State of Minnesota.

Before the taking of the testimony on the subject above referred to and the resubmission of the cause the court will entertain a motion in this case and the case of The State of South Dakota v. The State of Minnesota, No. 15 Original, to consolidate that case with this if counsel are so advised, to the end that the possibility may be considered of alleviating flood conditions in Lake Traverse and along the Bois de Sioux River by other means than the injunction prayed for in that case and to permit South Dakota to take testimony at the hearing now ordered in this case.

Test: JAMES D. MAHER,
Clerk Supreme Court, U. S.

A true copy.
(Seal.)"